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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 310

J. H. BELL,
Petitioner,

vs.

HUBERT B. SCUDDER, as Real Estate Commissioner of the State of California,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the District Court of Appeal of the State of California, Third Appellate District.

I.

SUMMARY OF PROCEEDINGS.

Petitioner filed his petition for writ of certiorari with this Court to review the decision of the District Court of Appeal of the State of California, having

*Copy of printed record not served on respondent. S. C. Rule 38(3).

been denied a hearing in the Supreme Court of the State of California without opinion. The petition and brief appended thereto lend no support to petitioner's contention that he was deprived of property without due process of law. The record discloses that the federal question was not timely raised, and that no substantial federal question was set up or claimed. The record does reveal that there was an adequate non-federal ground of decision.

II.

CORRECTION AND AMPLIFICATION OF STATEMENT OF THE CASE.

The statements made in petitioner's brief (pp. 2 and 3) do not correctly describe the procedure adopted by the respondent Commissioner. Petitioner (Pet. p. 2) admits that a license to do business as a real estate broker was issued to him but contends that the "effective date was postponed for a period of sixty days".

Petitioner (Pet. p. 3) states that the sole ground for the decision of the District Court of Appeal affirming the order of the trial Court was that there was a "renewal" of a pre-existing agency.

The record shows that after due notice of hearing before the Division of Real Estate of the State of California, the Real Estate Commissioner made his order renewing petitioner's license and suspending his right to operate thereunder for a period of sixty days as a disciplinary measure for violating the trust

imposed on a real estate agent and for failure to show good moral conduct. (Stats. (Cal.) 1937, p. 2124.)

Petitioner sought a writ of mandate to compel the Real Estate Commissioner to revoke his order of suspension. The trial Court determined that the Commissioner did not exceed his jurisdiction in directing the issuance of a broker's license subject to suspension and that the evidence regarding the sale of the King property was adequate to support the Commissioner's suspension of the renewed license for sixty days. The petition was dismissed by the Superior Court of the State of California in and for the County of Sonoma, and judgment affirmed by the District Court of Appeal. The opinion of the District Court of Appeal affirming the decision of the trial Court reveals that the Appellate Court found a "continuing agency" between petitioner and the Kings, and that the conclusion drawn from the evidence showed misrepresentations and bad faith on the part of the petitioner. Hearing by the Supreme Court denied without opinion.

III.

OPINION UNDER REVIEW.

The decision of the District Court of Appeal of the State of California affirms order of the trial Court dismissing petition for writ of mandate to respondent.

The District Court found that the evidence was conflicting in respect of the good faith of the peti-

tioner in the King transaction; that both parties recognized and acted upon a continuing agency; that the evidence supports the conclusion that petitioner concealed the true facts and misrepresented material facts, and furnished ample proof of the lack of good faith which warranted the Commissioner in suspending the renewed license for sixty days and was ample to support the judgment of the trial Court and the order of the Commissioner for failure on the part of petitioner to fulfill the requirements of sec. 12 of the Real Estate Act as amended in 1937. (Stats. 1937, p. 2124, Deering's General Laws 1937, Act 112.)

The opinion of the District Court of Appeal indicates that all the cases cited by respondent (same cases relied upon in the brief filed with this Court) were distinguishable on the facts and did not support petitioner's position, and that *Rattray v. Scudder,* 28 Cal. (2d) 214, 164 A.L.R. 1356, is determinative of all the *essential issues* (emphasis ours) of this case and is sound law.

Petitioner now seeks to have this Court review the evidence adduced at the original hearing before the Real Estate Commissioner (no additional evidence was offered or taken at the hearing on the petition for writ of mandate) and make findings of fact and conclusions of law favorable to petitioner.

IV.

QUESTION PRESENTED.

A reading of the petition and the brief attached thereto indicates that the sole question presented herein and in the lower Courts, is whether on the evidence, the conduct of the petitioner was such as would subject him to discipline as provided for by the Statutes of California (1937), sec. 12, p. 2124.

The petitioner does not contend that the statute is repugnant to the Constitution of the State of California or to the Federal Constitution. The petitioner does not contend that respondent as an officer authorized to administer the statute, is without power to suspend a license for causes enumerated in the statute.

V.

ARGUMENT.

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO ENTERTAIN THE PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks to invoke the jurisdiction of this Court under Judicial Code 28 U.S.C.A. 344(b) to establish that a federal right guaranteed by the Fourteenth Amendment has been violated without first having complied with the provisions of the section.

At no time has the petitioner raised the question of the respondent to hear and determine the controversy between the parties; or that he was not

afforded a full and complete hearing before the Commissioner and the Courts below. The record is silent on the issue of lack of due process.

(a) Lack of due process is not revealed by the record.

In the proceeding against petitioner by the Real Estate Board all the rights of due process were accorded petitioner, viz.: notice, right to appear and answer charges made against him. Reporter was present and made a record of the proceedings. Petitioner was given an opportunity to present evidence and cross examine witnesses. At the conclusion respondent Commissioner made his order renewing petitioner's license and suspending the rights thereunder for sixty days.

Petitioner filed his petition for a writ of mandate in the Superior Court. He had the right and opportunity to present further evidence but elected to submit the cause on the transcript of the evidence taken before respondent Commissioner. Petition was denied.

Petitioner does not deny he was afforded a full and complete hearing before the respondent Commissioner.

> "The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered."
>
> *Federal Power Commission, et al. v. Natural Pipe Line, et al.*, 315 U. S. 575.

(b) The federal question was not set up or claimed at the hearing before respondent Commissioner or at the hearing before the Superior Court.

It is a well settled doctrine that if a party intends to invoke, for the protection of his rights, the Constitution of the United States, he must so declare, and that unless he does so declare specially and unmistakably, the United States Supreme Court is without authority to reexamine a final judgment of a State Court.

Whitney v. California, 274 U. S. 357, 71 L. Ed. 1095;

Green Bay & M. Canal Co. v. Patten Paper Co., 172 U. S. 58;

Dewey v. Des Moines, 173 U. S. 193;

Capital Natl. Bank of Lincoln v. First Natl. Bank of Cadiz, 172 U. S. 425.

In order to justify the United States Supreme Court in reviewing the judgment or decree of a State Court, the record must show that the judgment rested upon the disposition of the federal question,

Marsh v. Nichols, 140 U. S. 344, 35 L. Ed. 413;

Citizens Bank v. Board of Liquidation, 98 U. S. 140, 25 L. Ed. 144.

(c) The State Court determined the case without consideration of the federal question.

In reviewing the judgment of a State Court, this Court will consider only such federal questions as shown to have been presented to the State Court and expressly or necessarily decided by it.

It was held in *Oxley Stave Co. v. Butler,* 166 U. S. 648, that where the record failed to show that any

reference was made in the Court of original jurisdiction to the Constitution of the United States, and it could not be inferred from the opinion of the highest Court of the State that that Court of the State was informed by the contention of the parties that any federal right, privilege or immunity was intended to be asserted, and for aught that appeared, the State Court proceeded in its determination of the case without any thought that it was expected to decide a federal question, the United States Supreme Court was without jurisdiction to review the decision of the State Court.

The decision on the federal question was not necessary to a determination of the case. (*Honeyman v. Hanan,* 300 U. S. 14, 18, citing *Lynch v. N. Y. ex rel. Pierson,* 293 U. S. 52, 54, and cases there cited.) *Southwestern Bell Telephone Co. v. Oklahoma,* 303 U. S. 206, 82 Fed. 751.

> "Inasmuch as we conclude that the decision was grounded upon the view that the appellant has not pursued the remedy afforded by state law for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal and deny the certiorari."
>
> *Copperweld Steel Co. v. Industrial Acc. Com. of Ohio,* 324 U. S. 780, 785.

(d) The decision of the State Court turned on a non-federal question.

On appeal from the judgment of the Superior Court dismissing petition for writ of mandate, petitioner

attempted to raise, for the first time, a purported violation of his rights under the Fourteenth Amendment of the Federal Constitution, by a reference thereto in his opening brief.

The District Court of Appeal makes no reference to a federal question in its opinion. On the contrary, the language shows clearly that its decision was based on a non-federal ground.

> "The crux of this case is the failure of the petitioner to establish to the satisfaction of the Commissioner his good reputation as a broker." (p. 494).

(e) Petitioner failed to exhaust remedies available to him in the State Courts.

Having failed to set up or claim that a constitutional right had been violated at the proper time and place, the petitioner failed to exhaust the remedies afforded him at the administrative hearing and in the State Courts.

It is the uniform and unqualified rule of decision in this jurisdiction and elsewhere that the exhaustion of the administrative remedy is a jurisdictional condition precedent to judicial relief of any kind in any form.

This doctrine is not only a matter of policy and statutory interpretation but is grounded upon our State Constitution.

> *Mojave River Irrigation District v. Superior Court*, 202 Cal. 717, 729.

Where the administrative remedy is not invoked within the time, the right to relief is forever barred.

Alexander v. State Personnel Board, 22 Cal. (2d) 198;

Reardon v. City of Daly City, 71 C. A. (2d) 759.

The exhaustion of the administrative process is jurisdictional.

The leading case of *Abelleira v. District Court of Appeal,* 17 Cal. (2d) 280, has finally settled the law on this point. There it was made to appear that the administrative agency threatened, upon an erroneous interpretation of the law, to pay over a portion of a statutory fund to irresponsible persons who had no right or claim to the fund. The respondent Court proposed, by appropriate process, to prevent the loss of the fund. The Supreme Court, however, basing its decision entirely upon the exhaustion doctrine, *prohibited* the proposed action of the respondent Court.

The failure to present evidence or object or request administrative relief is a failure to exhaust the administrative remedy.

Alexander v. State Personnel Board, 22 C. (2d) 198;

Reardon v. City of Daly City, 71 C. A. (2d) 759;

U. S. v. Superior Court, 19 C. (2d) 189;

Federal Communications Com. v. Pottsville Broadcasting Company, 309 U. S. 134, 60 S. Ct. 437, 440.

Administrative remedies must be exhausted before the judicial assistance of the Courts of the state is available.

Alexander v. State Personnel Board, 198 C. (2d) 198;

Abelleira v. District Court of Appeal, 17 C. (2d) 280, 132 A.L.R. 715.

(f) There s no substantial federal question.

It is a well settled principle of law that a state may, in the exercise of its police power, regulate the manner in which business is conducted within its borders; to provide for proof of certain qualifications before issuing a permit to operate the business to be regulated; and to have continued supervision over its licensees to the end that the citizens within the state be protected. The Legislature may provide that under given circumstances such a license may be permanently revoked, or rights acquired by the licensee be suspended for cause.

The Supreme Court of the State of California has repeatedly held that the right to engage in a business or profession is not an absolute right but a creature of statute, subject to control by the Legislature.

In the Matter of An Investigation of the Conduct of the Examination for Admission to Practice Law, 1 Cal. (2d) 61;

Cohen v. Wright, 22 C. 293, 319.

And that the Legislature may delegate to an administrative agency authority to ascertain and determine the existence of facts which constitute the basis for application and enforcement of legislative action. Administrative agencies are charged with the execution of statutory provisions. The Legislature must provide definite standards as a guide to administrative action and to prevent arbitrary action.

Housing Authority v. Dockweiler, 14 C. (2d) 437, 94 Pac. (2d) 794;

Jersey Maid Milk Products Co. v. Brock, 13 C. (2d) 620, 91 Pac. (2d) 577;

Dominguez Land Corporation v. Daugherty, 196 C. 468, 238 Pac. 703.

The Legislature has set forth standards in the Real Estate Act, variously amended since 1917 and added by Stats. of 1943, Chap. 127, as a definite guide to the Real Estate Commissioner in taking any action authorized by the Act.

The Supreme Court further observed that the Court may on a petition for a writ of mandate review the acts and decisions of state-wide administrative agencies

> "under the constitutional power of the Legislature to regulate business carried on within the state, the Legislature has the right to terminate such business conditionally."
>
> *McDonough v. Goodcell,* 13 C. (2d) 741, 91 Pac. (2d) 1035, 123 A.L.R. 1205;
>
> *Drummey v. Board of Funeral Directors,* 13 C. (2d) 75, 87 Pac. (2d) 848.

The enactment of reasonable regulations under the police power results in no deprivation of property without due process of law. It is undoubtedly the right of every citizen to follow any lawful business, subject only to such restrictions as are imposed on all persons who choose to follow such business.

> "* * * there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. * * *"
>
> *Dent v. West Virginia,* 129 U. S. 114.

> "The general rule established by the great weight of authority appears to be that a license from the state in the exercise of its police power permitting it to do all that which, without a license would be unlawful, is not a contract and does not convey a vested right."
>
> *Rosenblatt v. State Board of Pharmacy,* 69 C. A. (2d) 69.

To the same effect

> *In the Matter of an Investigation of the Conduct of the Examination for Admission to Practice Law,* 1 C. (2d) 61,

> "A real estate license can be denied if the applicant fails to furnish proof of honesty, truthfulness and good reputation."
>
> *Real Estate Act, Business and Professions Code,* secs. 10150 and 10152.

Certainly if a license may be denied on that ground, it can be suspended for a brief period of time for the same reason.

In *Hall v. Scudder,* 74 C. A. (2d) 433, the Court held that one who holds an unsuspended and unrevoked license which is in force at the time of his application for renewal, is entitled to a renewal as a matter of right. The rights exercised thereunder may be suspended under the police power in order to discipline the licensee for conduct which the Real Estate Commissioner found was inimical to the public welfare.

(g) The question is now moot.

Petitioner at no time ceased to operate as a real estate broker, although under the order of suspension by the respondent Commissioner.

We submit that the record reveals no deprivation of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
September 26, 1947.

Respectfully submitted,

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